

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed)	RM-10586
and Mobile Broadband Access, Educational and Other)	
Advanced Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	
Part 1 of the Commission's Rules -- Further Competitive)	WT Docket No. 03-67
Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable Multipoint)	MM Docket No. 97-217
Distribution Service and the Instructional Television)	
Fixed Service to Engage in Fixed Two-Way)	
Transmissions)	
)	
Amendment of Parts 21 and 74 of the Commission's Rules)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution)	RM-9718
Service and in the Instructional Television Fixed Service)	
for the Gulf of Mexico)	
)	
Promoting Efficient Use of Spectrum Through)	WT Docket No. 00-230
Elimination of Barriers to the Development of)	
Secondary Markets)	

NEXTWAVE PETITION FOR PARTIAL RECONSIDERATION

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EXECUTIVE SUMMARY

NextWave applauds the Commission and the wireless industry for the progress to date in creating a workable band plan and service rules for EBS and BRS spectrum, but urges the Commission to reconsider two important decisions made in the *Second Report and Order*.

First, the Commission should immediately auction all available and unassigned BRS and EBS spectrum instead of postponing auctions for unassigned and spectrum until 2010 when the transition has concluded. Postponing the auction of available but currently unassigned BRS and EBS spectrum for four years will severely disadvantage new entrants and will not serve the policy objectives set forth by the Commission as guiding principles in this rulemaking, including: (1) speeding service to the public; (2) promoting competition, and; (3) creating opportunities for new entrants. As the number of applications for the Advanced Wireless Services auction makes clear, there is an urgent need in the marketplace today for wireless broadband spectrum.

Second, instead of splitting the football “of its own accord” for grandfathered EBS E- and F-block licensees and co-channel BRS licensees whose service areas overlap by more than 50% and who fail to reach agreement in 90 days, the Commission should provide a procedure that requires licensees to equitably split the spectrum between them in relative proportion to the population each commands. In NextWave’s view, there is sufficient time at this juncture to equitably resolve overlap scenarios, and NextWave’s proposed resolution would provide each licensee with the ability to preserve its entire geographic service area and serve the entire overlap area with a lesser amount of spectrum.

Implementing the limited changes requested by NextWave should serve the Commission’s goals in this proceeding and the public interest by: (1) creating new spectrum

opportunities for new entrants which will encourage competition in the band and facilitate innovative wireless broadband deployments; and (2) preserving to the greatest extent possible the value of spectrum that is already licensed to incumbents.

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NEXTWAVE PETITION FOR PARTIAL RECONSIDERATION

NextWave Broadband Inc. ("NextWave"), by its attorneys, and pursuant to Section 1.429(d) of the Federal Communications Commission's ("FCC" or "Commission") Rules, petitions the Commission for reconsideration of two aspects of the *Second Report and Order*.¹

First, the Commission should immediately auction all available and unassigned Broadband Radio

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 F.C.C.R. 5606 (2006) ("*Second Report and Order*").

Service (“BRS”) and Educational Broadband Service (“EBS”) spectrum instead of postponing auctions for unassigned BRS and EBS spectrum until 2010 when the transition has concluded. Second, instead of splitting the football “of its own accord” for grandfathered EBS E- and F-block licensees and co-channel BRS licensees who fail to reach agreement in 90 days, the Commission should provide a procedure that requires Licensees to equitably split the spectrum between them in relative proportion to the population each commands, so that each licensee can serve the entire overlapping area with a smaller subset of spectrum.

Overall, NextWave applauds the Commission and the wireless industry for the progress to date in creating a band plan and service rules for EBS and BRS spectrum that have revitalized the 2.5 GHz band and created spectrum that is finally viable for the provision of advanced wireless broadband services. Implementing the limited changes requested by NextWave serves the Commission’s goals in this proceeding, and the public interest, by: (1) preserving to the greatest extent possible the value of spectrum that is already licensed to incumbents; and (2) creating new spectrum opportunities for new entrants which will encourage competition in the band and facilitate deployments.

I. INTRODUCTION

NextWave is a wireless technology company engaged in the development of next-generation mobile broadband and wireless multimedia products, technologies and services. NextWave is developing proprietary network and device technology based on the IEEE 802.16e WiMAX standard, which it intends to market to network infrastructure and device manufacturers and network operators worldwide under the WiMAXplus trademark (“WiMAXplusTM”). NextWave also plans to partner with service providers to build and operate 802.16e WiMAX-compliant networks that operate on NextWave’s licensed spectrum and utilize network and

device equipment that incorporates WiMAXplus products and technologies. NextWave's WiMAXplus enhanced network solutions, combined with its wireless multimedia software products, will offer wireless service providers, cable operators, multimedia content distributors and Internet service providers an unparalleled platform to provide advanced wireless broadband services to their customers.² To facilitate the deployment of its network solutions, NextWave has accumulated a spectrum footprint across the U.S. that includes BRS and EBS spectrum and is soon to cover roughly 200 million people.

II. THE COMMISSION SHOULD IMMEDIATELY IDENTIFY AND AUCTION UNASSIGNED BRS AND EBS SPECTRUM

The Commission determined in the *Second Report and Order* that it would be premature to make any decisions regarding unassigned EBS and BRS spectrum until it has observed the extent to which markets are transitioned in 2010 or beyond.³ NextWave urges the Commission to reconsider this decision, which is not supported by: (1) the Commission's own goals in this proceeding; and (2) the record in this proceeding. Given the demand for wireless broadband spectrum, fallow BRS and EBS spectrum must be identified and made available in the near term so that it can be used by new entrants and competitive wireless service providers to offer valuable and needed wireless broadband services to the public now, not four years from now.

A. The Commission's Own Goals In This Proceeding Support Immediate Auctions Of Available Spectrum.

Postponing the auction of available but currently unassigned BRS and EBS spectrum until 2010 will not serve the policy objectives set forth by the Commission as guiding principles

² In addition, through its subsidiary, PacketVideo, NextWave is the world's largest independent provider of embedded multimedia software for mobile phones.

³ *Second Report and Order*, ¶ 313.

in this rulemaking, including: (1) speeding service to the public;⁴ (2) promoting competition, and; (3) creating opportunities for new entrants.⁵ Making vacant BRS and EBS spectrum available to new entrants is also critical to establishing nationwide wireless footprints that are essential to compete with entrenched incumbents.⁶ With respect to other wireless services, the Commission has noted when trying to *avoid* auction delays that it is important to “ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public without delays, and promote the efficient and intensive use of the electromagnetic

⁴ The importance of speeding deployment of broadband services throughout America has been a matter of national policy for some time. Congress adopted Section 706 of the Telecommunications Act of 1996 requiring that the Commission “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .” Telecommunications Act of 1996, P.L. 104-104, Title VII, § 706, 110 Stat. 153. Section 309(j) of the Communications Act of 1934, as amended, establishes similar objectives, such as “rapid deployment of new technologies, products, and services for the benefit of the public,” and “efficient and intensive use of the electromagnetic spectrum.” 47 U.S.C. § 309(j)(3)(A) and (D). The President also has made broadband deployment a priority, stating back in 2004: “I believe there ought to be broadband in every community, and available to every house by the year 2007, in order to make sure America has lasting prosperity. And that's just the beginning. I think not only should broadband be accessible, but there ought to be ample providers available to every house and every community in America.” *President Outlines Path for Lasting Prosperity in Wednesday Speech Remarks by the President at the Newspaper Association of America Annual Convention*, Omni Shoreham Hotel, Washington, D.C., Office of the Press Secretary (April 21, 2004) (available at <http://www.whitehouse.gov/news/releases/2004/04/20040421-5.html>).

⁵ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 F.C.C.R. 14165, ¶ 5 (2004) (“*First Report and Order*”).

⁶ In the CMRS context, for example, the Commission has concluded that “operators with larger footprints can achieve certain economies of scale and increased efficiencies compared to operators with smaller footprints.” *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Seventh Report, 17 F.C.C.R. 12985, 12997-98 (2002). The focus on nationwide wireless networks has been a central theme of the Commission's regulatory approach for wireless services since it established the CMRS rules, when it explained that “Our national economy is strengthened and the public interest is served to the extent we are successful in promoting and achieving the broadest possible access to wireless networks and services by all telecommunications users.” *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 F.C.C.R. 1411, 1421 (1994).

spectrum.”⁷ The Commission should take the same approach here and ensure rapid deployment of wireless broadband services over EBS and BRS spectrum by avoiding further delays in EBS and BRS spectrum auctions. Rapid deployment of new technologies in the 2.5 GHz band should be encouraged without delay by making all fallow EBS and BRS spectrum available for service to the public now.

1. Completion Of The Transition Is Not A Compelling Policy Justification For Postponing Assignment Of Fallow BRS And EBS Spectrum.

The Commission’s determination that spectrum should not be auctioned now because of the impending transition is not a sufficiently compelling policy justification to postpone making needed wireless broadband spectrum available to new entrants. Transitions may not conclude until sometime in 2010, and there is an urgent need in the marketplace today for available wireless broadband spectrum. Nowhere was this point made clearer than in the 252 applications received by the Commission for the Advanced Wireless Services auction. The number of applications for wireless broadband spectrum in this auction represents the third-highest total ever received for an FCC spectrum auction not involving broadcast spectrum.

Waiting four years to auction vacant EBS and BRS spectrum will not further the goal of getting valuable wireless broadband spectrum into the hands of new entrants like NextWave that both need the spectrum and will use it to build needed wireless broadband networks. Instead, waiting to auction unassigned spectrum until at least 2010 will ensure that vacant spectrum will remain vacant for many years and will disadvantage the ultimate licensees of this spectrum, whose operations will severely lag behind existing licensees who will be first to market.

⁷ See, e.g., *Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC Petition for Declaratory Ruling and Motion for Stay of Auction No. 65*, Order, 12 F.C.C.R. 5117, ¶ 16 (2006) (in which the Commission denied a request to postpone FCC Auction No. 65). See also *Auction of Licenses*

Moreover, NextWave agrees with WCAI, Clearwire, Sprint and HITN that an auction prior to the transition will not add complexity and cost to the transition.⁸ Newly issued spectrum will not need to be “transitioned” from the old band plan to the new one, and purchasers of EBS white space will have no need for new downconverters or program track migration because they have no services to transition to the middle band segment. Newly auctioned spectrum can be readily incorporated into deployment plans. Simply put, the need for immediate access to vacant EBS and BRS spectrum is not dependent upon individual market transitions.⁹

2. New Entrants Require Spectrum Now To Compete With Established Incumbents.

As the Commission acknowledged in this proceeding, “one of our goals is to encourage competition in wireless broadband by creating new opportunities for new entrants.”¹⁰ Delaying the auction of unassigned BRS and EBS spectrum until *after* services have already commenced by existing license holders not only gives spectrum-rich incumbents an additional head-start on

for VHF Public Coast and Location and Monitoring Service Spectrum, Order, 17 F.C.C.R. 19746, 19754 ¶ 15 (2002) (in which the Commission denied a request to postpone FCC Auction No. 39).

⁸ See Comments of the Wireless Communications Association International, Inc. (“WCAI”), WT Docket No. 03-66 (filed Jan. 10, 2005) at 21-22; Comments of Clearwire Corporation (“Clearwire”), WT Docket No. 03-66 (filed Jan. 10, 2005) at 7; Comments of Sprint Corporation (“Sprint”), WT Docket No. 03-66 (filed Jan. 10, 2005) at 3; Reply Comments of Sprint, WT Docket No. 03-66 (filed Feb. 8, 2005) at 10-11; Reply Comments of the Hispanic Information and Telecommunications Network (“HITN”), WT Docket No. 03-66 (filed Feb. 8, 2005) at 4-6.

⁹ More spectrum may become available after the deadlines for transitions and substantial service demonstrations have passed. If needed, the Commission can conduct an additional auction of available spectrum thereafter, as it has done for other wireless services. For example, in Auction No. 38, the Commission re-auctioned Upper 700 MHz Guard Band spectrum that went unsold in Auction No. 33. Similarly, Auction No. 61 covered spectrum that went unsold in Auction No. 57; Auction No. 62 covered spectrum that went unsold in Auction No. 37; Auction No. 50 covered spectrum that went unsold in Auction No. 41; Auction No. 23 covered spectrum that went unsold in Auction No. 17; Auction No. 63 covered spectrum that went unsold in Auction No. 53; and Auction Nos. 49 and 60 covered spectrum that went unsold in Auction No. 44. There have been multiple auctions of Personal Communications Services (“PCS”) spectrum (specifically, Auction Nos. 4, 5 10, 11, 22, 35 and 58). PCS C Block spectrum has been auctioned five times and the PCS F Block spectrum has been auctioned 4 times.

¹⁰ *Second Report and Order*, ¶ 277 n.680.

competition, but makes it harder for new entrants to attract the financing required to build out their networks. Capital markets look to the strength of a company's spectrum portfolio in determining whether to provide a company with financing. As the Wireless Broadband Access Task Force recommended in its recent report, the Commission should recognize the importance of "protecting the flow of investment capital" to the "development of wireless broadband."¹¹ It is important for the Commission to encourage new entrants to utilize the EBS/BRS band and provide valuable, competitive wireless broadband services, by helping them gain access to vacant wireless broadband spectrum and capital investment.

It is particularly critical to have sufficient spectral resources to satisfy market demand for the broadband market, where both service limitations and consumer expectations are driven by fast-moving advances and innovation in technology.¹² As the Wireless Broadband Access Task Force noted, "[s]hortening the amount of time it takes to get spectrum out of the government's hands and into the market, where companies can use it to provide services that consumers demand, is critical in the fast-paced and ever-changing world of technology and broadband."¹³ Indeed, the cited relationship between spectrum access and the ability of an operator to implement a wireless business plan illustrates why every incremental opportunity to acquire spectrum is a golden one for new entrants. It is critical that the Commission cease warehousing

¹¹ *Connected & On the Go Broadband Goes Wireless Report by the Wireless Broadband Access Task Force*, Report, GN Docket No. 04-163, 2005 FCC LEXIS 1488 at 67 (rel. Feb. 2005) ("Broadband Access Task Force Report") (citing *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 F.C.C.R. 1411, 1421 (1994) ("The continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. It thus is essential that our policies promote robust investment in mobile services.")).

¹² See *Broadband Access Task Force Report* at 46 ("A crucial ingredient to the development of broadband applications and services over wireless networks is the availability of sufficient spectrum for the provision of wireless broadband.").

¹³ *Broadband Access Task Force Report* at p. 61.

vacant EBS and BRS spectrum and get it into the hands of new entrants like NextWave who can put it to its highest and best use.

B. The Record Supports Auctioning Vacant Spectrum Immediately And Identifying Spectrum That Can Be Auctioned.

1. The Commission Should Re-Auction Available BRS BTA Authorizations Now.

As the Commission is aware, every commenter who addressed the timing of BRS auctions supports the immediate auction of vacant BRS spectrum.¹⁴ Nearly all commenters also support continuing to assign BRS spectrum on the basis of Basic Trading Area ("BTA") authorizations that have already been issued.¹⁵ At a minimum, NextWave urges the Commission to immediately re-auction all available BRS BTA authorizations that have been returned to the Commission and are not subject to pending regulatory proceedings. Re-auctioning available BRS BTA licenses requires no new rules or procedures since re-auctioning was specifically contemplated and authorized by the Commission when it devised the auction scheme for this

¹⁴ See Comments of Sprint, WT Docket No. 03-66 (filed Jan. 10, 2005) at 2; Comments of Clearwire, WT Docket No. 03-66 (filed Jan. 10, 2005) at 4-5; Comments of Nextel Corporation ("Nextel"), WT Docket No. 03-66 (filed Jan. 10, 2005) at 7; Comments of WCAI, WT Docket No. 03-66 (filed Jan. 10, 2005); Comments of C&W Enterprises, Inc., WT Docket No. 03-66 (filed Jan. 10, 2005) at 3; Comments of SpeedNet, L.L.C., WT Docket No. 03-66 (filed Jan. 10, 2005) at 3; Comments of Wireless Direct Broadcast System, WT Docket No. 03-66 (filed Jan. 10, 2005) at 3; Comments of Cheboygan-Otsego-Presque Isle Educational Service District and PACE Telecommunications Consortium, WT Docket No. 03-66 (filed Jan. 10, 2005) at 3; Comments of Digital Broadcasting Corp., WT Docket No. 03-66 (filed Jan. 10, 2005) at 3.

¹⁵ See, e.g., Comments of Sprint, WT Docket No. 03-66 (filed Jan. 10, 2005) at 4; Comments of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, WT Docket No. 03-66 (filed Jan. 10, 2005) at 4-5; Comments of Clearwire, WT Docket No. 03-66 (filed Jan. 10, 2005) at 10; Reply Comments HITN, WT Docket No. 03-66 (filed Feb. 8, 2005) at 5; Comments of Independent MMDS Coalition, WT Docket No. 03-66 (filed Jan. 10, 2005) at 2; Comments of ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED"), WT Docket No. 03-66 (filed Jan. 10, 2005) at 9; Comments of Nextel, WT Docket No. 03-66 (filed Jan. 10, 2005) at 8; Comments of WCAI, WT Docket No. 03-66 (filed Jan. 10, 2005) at 24-25.

spectrum.¹⁶ Immediately auctioning available BRS BTA licenses is supported by the record in this proceeding and furthers the Commission's objectives in this proceeding by encouraging competition and creating new opportunities for new entrants.

2. EBS Auctions Should Also Occur Now, But Decisions Regarding EBS White Space Should Not Delay Re-Auctioning BRS Spectrum.

In the interest of creating opportunities for new entrants, and facilitating the speed of deployments in the band, the Commission must not unnecessarily delay auctions for EBS spectrum, particularly given that EBS spectrum represents 60 percent of the spectrum in the 2.5 GHz band. However, regardless of how the Commission decides important issues related to EBS white space auctions, the re-auctioning of available BRS BTA authorizations should not be delayed.

a. Geographic Service Areas for New EBS Licenses.

Nearly all commenters agreed that when EBS white space is auctioned, it should be assigned on the basis of the same BTAs used for BRS spectrum.¹⁷ Given the already complex

¹⁶ The Commission modeled the competitive bidding procedures governing the auction of BRS BTA licenses under Part 21 of its rules upon the general competitive bidding procedures under Part 1 of its rules. *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Report and Order, 10 F.C.C.R. 9589 (1995). As the Commission then indicated, "we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the BTA service area." *Id.*, ¶ 148. *See also*, 47 C.F.R. § 21.930(d)(2) which discussed the Commission's intent to take back BRS spectrum that is not used to serve the public and reauthorize it pursuant to competitive bidding.

¹⁷ *See* Joint Comments of the Catholic Television Network and the National ITFS Association ("CTN/NIA"), WT Docket No. 03-66 (filed Jan. 10, 2005) at 11; Comments of Clearwire, WT Docket No. 03-66 (filed Jan. 10, 2005) at 10-11; Reply Comments of the HITN, WT Docket No. 03-66 (filed Feb. 8, 2005) at 5; Comments of Independent MMDS Coalition, WT Docket No. 03-66 (filed Jan. 10, 2005) at 2; Comments of IMWED, WT Docket No. 03-66 (filed Jan. 10, 2005) at 9; Comments of Nextel, WT Docket No. 03-66 (filed Jan. 10, 2005) at 8; Reply Comments of Sprint, WT Docket No. 03-66 (filed Feb. 8, 2005) at 11-13; Comments of WCAI, WT Docket No. 03-66 (filed Jan. 10, 2005) at 24; Comments of George Mason University Instructional Foundation, Inc. ("GMU"), WT Docket No. 03-66 (filed Jan. 10, 2005) at 6-7.

regulatory regime for EBS and BRS, NextWave supports the Commission and the industry in trying to harmonize the regulatory regimes and licensing schemes for EBS and BRS spectrum. Affording EBS BTA authorizations the same attributes as BRS BTA authorizations (i.e., a single EBS BTA authorization that provides the EBS licensee with rights to all available EBS spectrum in the BTA, subject to the rights of EBS incumbents) makes sense for two reasons: (1) Given that most incumbent EBS licensees are collocated with incumbent BRS licensees, a blanket EBS BTA license would, in many cases, provide the same actual coverage as the BRS BTA licenses that are already authorized; and (2) Providing identical BRS and EBS BTA authorizations, with the same type of reversionary and other rights, will assist in not further complicating the already complex 2.5 GHz regulatory regime.

b. Timing of EBS Auctions.

Slightly more than half of the commenters who addressed the timing of EBS white space auctions support immediate auctions, or auctions within 1 year of the release of the *Second Report and Order*, or auctions within 2 years of the effective date of the new rules.¹⁸ The other group of commenters support waiting to auction EBS white space until after transitions have concluded in 2010.¹⁹ Many commenters also noted that new entrants need access to wireless broadband spectrum now, and nothing about the transition process will change the urgent need

¹⁸ See Reply Comments of WCAI, WT Docket No. 03-66 (filed Feb. 8, 2005) at 21-22; Comments of HITN, WT Docket No. 03-66 (filed Jan. 10, 2005) at 4-6; Reply Comments of Sprint, WT Docket No. 03-66 (filed Feb. 8, 2005) at 10; Reply Comments of Clearwire, WT Docket No. 03-66 (filed Feb. 8, 2005) at 16; Comments of Clearwire, WT Docket No. 03-66 (filed Jan. 10, 2005) at 4-5; Reply Comments of Nextel, WT Docket No. 03-66 (filed Feb. 8, 2005) at 8-9.

¹⁹ See Comments of GMU, WT Docket No. 03-66 (filed Jan. 10, 2005) at 6-7; Reply Comments of IMWED, WT Docket No. 03-66 (filed Feb. 8, 2005) at 8; Joint Comments of CTN/NIA, WT Docket No. 03-66 (filed Jan. 10, 2005) at 11.

for unassigned spectrum in the 2.5 GHz band. Moreover, as discussed above, issuing vacant spectrum now will not interfere with the transition in any way.²⁰

As Clearwire correctly noted in its comments and reply comments, educators may require some lead time to prepare for an EBS white space auction, but a delay until 2010 to auction this valuable spectrum is not justified or necessary.²¹ Indeed, many EBS licensees are today conducting their own private auctions for the lease of EBS spectrum, which is clearly more complicated and time-consuming than participating in an auction conducted by the Commission. In addition, the EBS community has been aware that the Commission must auction EBS spectrum since 1997,²² which the FCC reiterated in its April 2003 Notice of Proposed Rulemaking in this proceeding.²³ EBS white space auctions, which will be a critical new source of access to 2.5 GHz spectrum, should be scheduled by the Commission without delay.

3. Vacant BRS And EBS Spectrum Should Be Immediately Identified.

NextWave agrees with the comments and reply comments of WCAI and Clearwire that the FCC must devote its resources to reconciling the ULS database, eliminating licenses that are no longer viable but are nevertheless listed as “active” in ULS, and helping the industry and the Commission to identify those licenses that are available for auction. Reconciliation of the ULS

²⁰ See *supra* pp.5-6.

²¹ Reply Comments of Clearwire, WT Docket No. 03-66 (filed Feb. 8, 2005) at 15-16.

²² On August 5, 1997, Congress enacted the Budget Act, which expanded the Commission’s auction authority under section 309(j) of the Communications Act to include commercial broadcast applicants, including ITFS applicants. See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for the Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 F.C.C.R. 15920, 15921 (1998) (“We adopt general competitive bidding procedures to select among mutually exclusive applicants for...Instructional Television Fixed Service (ITFS) licenses.”).

²³ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rulemaking, 18 F.C.C.R. 6722, 6734, 6814-20 (2003).

database requires only that the Wireless Telecommunications Bureau (“WTB”) finish the Broadband Licensing System (“BLS”) corrections project that it undertook in 2002 to ensure that information in ULS is accurate, current and comprehensive.²⁴ Based upon the volume of responses and corrections submitted, the Commission is well aware that licensing information available in BLS, and now in ULS, is inaccurate.²⁵ Reconciliation of the ULS database will serve the industry, the Commission’s goals in this proceeding, and the public interest by identifying vacant EBS and BRS spectrum that, if auctioned, will create new opportunities for new entrants, particularly those that are spectrum constrained.²⁶

III. SIGNIFICANT OVERLAPS INVOLVING GRANDFATHERED E AND F CHANNELS THAT ARE NOT VOLUNTARILY SETTLED SHOULD BE RESOLVED BY PROPORTIONALLY SPLITTING THE SPECTRUM AND ALLOWING EACH LICENSEE TO SERVE THE ENTIRE OVERLAP AREA

In the *Second Report and Order*, the Commission adopted new rules for addressing situations where grandfathered E and F channel EBS stations have protected service areas that overlap those of a co-channel BRS licensee by more than 50 percent.²⁷ Specifically, affected licensees are provided a 90-day mandatory negotiation period, and if no mutual agreement

²⁴ When administration of EBS and BRS spectrum became the responsibility of the WTB in 2002, the WTB began a comprehensive migration process by which information in the legacy BLS system was moved to the ULS system. See FCC Public Notice, *Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS, and MMDS License Status and Pending Applications*, 17 F.C.C.R. 20538 (2002); FCC Public Notice, *Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS, and MMDS Pending Legal Matters*, 17 F.C.C.R. 20543 (2002).

²⁵ For example, as the WTB is aware, EBS spectrum, which represents the majority of spectrum in the 2.5 GHz band, was formerly assigned on a license basis, not on a construction certification. All EBS licenses for which construction certifications were not filed (or for which there is no pending extension request or other pleading) must be cancelled from the database. In addition, BRS licenses still show as “active” even if no renewal application was filed. These licenses must also be cancelled unless pleadings regarding the renewal are pending.

²⁶ See *First Report and Order*, ¶ 5 (emphasizing the Commission’s objective of encouraging competition by creating new opportunities for new entrants).

²⁷ See *Second Report and Order*, ¶ 350 (codified at 47 C.F.R. § 27.1216).

results, the Commission will split the football “on its own accord.”²⁸ In adopting this approach, the Commission expressly rejected a proposal to split the channels and give the LBS and UBS channels to the BRS licensee while limiting the EBS licensee to the MBS channel.²⁹ The Commission indicated that limiting the EBS licensee to one MBS channel is not “an equitable solution.”³⁰ NextWave agrees with the Commission, but suggests that there might be a better resolution to these situations than the Commission randomly splitting the football on its “own accord.”

In NextWave’s view, and given that there is sufficient time at this juncture to equitably resolve these overlap scenarios, a better approach might be to require licensees who cannot come to agreement within the 90-day negotiation period to split the spectrum between them, within 30 days thereafter, according to the procedure below. The result will allow each licensee to serve the entire overlapping area with a smaller subset of the spectrum they currently hold.

The required procedure would work as follows: (1) The licensees would determine the total population in the overlap area based upon the most recent official United States Census numbers. Licensees can privately agree whether or not they will use population growth factors in this calculation. Any discrepancy between the population numbers of the licensees will be averaged for purposes of all calculations; (2) The overlap area would be split using the traditional “split the football” methodology;³¹ (3) The population contained in each licensee’s half or slice of the overlap area would then be calculated and each licensee’s corresponding

²⁸ *Id.*

²⁹ *Id.*, ¶ 350.

³⁰ *Id.*

³¹ *First Report and Order*, ¶ 60, n.137. *See also* 47 C.F.R. § 27.1206(a).

relative percentage of the total population would be calculated; (4) This percentage would then be used to split the spectrum among the licensees in relative proportion to the percentage of population each licensee commands in the overlap area. The percentage would be rounded to the percentile closest to 0%, 25%, 50%, 75% or 100%. A licensee with a population ratio closest to 25%, for example, would retain one of the four channels; (5) The licensees would decide among themselves, according to their individual educational or business needs, the channels each will retain and provide a joint notice to the Commission. The grandfathered EBS licensee will have a right of first refusal to access the middle band segment channel.

Two examples illustrate how the procedure would work. First, where the geographic service areas of each licensee completely overlap, and thus the licensees have command of the same population number, each licensee would be accorded half of the channels to serve the entire overlapping area (for a four channel group, each licensee would receive two channels). In this scenario the licensees would only need to determine which channels each will retain, and provide the Commission with joint notice. Second, where the overlapping geographic service area contains a population of 400,000, and where one licensee's sliver or half of the overlapping area includes a population of 100,000, and the other licensee's sliver or half of the overlapping area includes a population of 300,000, the licensee with the greatest population would receive three channels to serve the entire overlapping area ($300,000 / 400,000 = 75\% = 3$ channels), and the other licensee would receive one channel ($100,000 / 400,000 = 25\% = 1$ channel).

NextWave believes this approach serves the public interest by avoiding the random partitioning of the geographic service area by the Commission under the presently adopted approach. The resolution would provide each licensee with the ability to preserve its entire

geographic service area and the flexibility to serve the entire overlap area with a lesser amount of spectrum.

IV. CONCLUSION

NextWave applauds the Commission and the wireless industry for the progress to date in creating a workable band plan and service rules for EBS and BRS spectrum. In concluding this proceeding, NextWave respectfully requests that the Commission reconsider its decision to delay auctions until after the transition in 2010 and immediately auction fallow BRS and EBS spectrum. Such an action is consistent with the Commission's goals in this proceeding of encouraging competition by creating opportunities for new entrants and speeding service to the public. The re-auctioning of available BRS BTA licenses should not be delayed. NextWave also suggests that the Commission consider a new approach to splitting licensed spectrum between grandfathered EBS licensees and co-channel BRS licensees so that each licensee can retain spectrum and serve the entire overlapping area. Making these two changes to the EBS/BRS regulatory regime should serve the Commission's goals and yield significant benefits for new competitive entrants, and incumbent EBS and BRS licensees.

Respectfully submitted,

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